Supreme Court, U. S.
FILED
AUG 6 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-200

FRANCES JAHNER, Executrix of the Estate of Mathias Jahner,
Petitioner,

vs.

VALENTINE JACOB,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

WILLIAM R. MILLS
Box 518
406 Main Avenue
Bismarck, North Dakota 58501
Attorney for Petitioner

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, 421-3030

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 2

Questions Presented for Review 2

Constitutional Provisions and Statutes Involved 3

Statement of Facts 4

Time and Manner of Raising Constitutional Questions 6

Argument 7

Importance of Questions Presented 13

Conclusion 14

Appendix—

Decision A1

Judgment A25

Table of Authorities

Cases

Dartmouth College v. *Woodward*, 4 Wheat (US) 518, 4 L Ed 629 7

Juster Bros. v. *Christgau*, (Minn 1943) 7 NW2d 501 12

Constitutional Provisions and Statutes

Constitution of the United States—

Amendment V 3

Amendment XIV 3

North Dakota Business Records Act—

31-08-01 NDCC 8

31-08-10.1 NDCC 8

28 U.S.C. 1257 (3) 2

TEXTS

16 Am Jur 2d, Const Law 454 7
32 Am Jur 2d, Fed Pract 242, 259 8
32 Am Jur 2d, Fed Proc 262 6

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-.....

FRANCES JAHNER, Executrix of the
Estate of Mathias Jahner,
Petitioner,

vs.

VALENTINE JACOB,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Petitioner prays for the issuance of a Writ of Certiorari to the Supreme Court of North Dakota to review the judgment in the case of *Frances Jahner, Executrix of the Estate of Mathias Jahner* v. *Valentine Jacob.*

OPINIONS BELOW

The decision and opinion of the North Dakota Supreme Court in *Frances Jahner, Executrix of the Estate of Mathias Jahner* v. *Valentine Jacob* was made and filed the 6th day of May, 1975, and the order denying the Petition for Rehearing was made and filed the 24th day of

June, 1975, and the order denying the Application to Reconsider the Rehearing was made and filed the 30th day of June, 1975. (*Frances Jahner, Executrix of the Estate of Mathias Jahner* v. *Valentine Jacob,* ..... N.W. 2d ..... Printed in Appendix)

JURISDICTION

The statutory authority for issuance of a Writ of Certiorari is 28 U.S.C. 1257 wherein it is provided that the court is authorized to issue said writ in any cause where a final judgment has been passed upon by the highest court of a state and where any title, right, privilege or immunity is specially set up or claimed under the Constitution of the United States.

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C., Section 1257 (3).

QUESTIONS PRESENTED FOR REVIEW

Statements dictated by absent witnesses were received in evidence against the defendant under the North Dakota Business Act. The Supreme Court of North Dakota held some of the statements were inadmissible but then directed the trial courts to admit everything into evidence. By concealing the basis for the trial court's decision, the presumption of judicial infallibility would make the judgment impregnable. Does the Business Records Act, as interpreted, violate the constitutional right to due process?

Does the presumption of judicial infallibility combined with the superintending court's direction to the trial court

to conceal errors, accompanied by the appellate court's announced policy to overturn only when it feels like it, constitute an unequal application of the law?

Does the admission in evidence of important testimony, given by unsworn witnesses, whose cross-examination was prohibited, constitute a denial of due process?

When the trial judge voluntarily admitted he had been under medication that impaired his judicial capacity and made him irritable, and in such physical pain that trials had to be kept short and cross-examination denied, does this constitute a denial of due process?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Amendment V, United States Constitution: No person shall be held to answer for a capital or otherwise infamous crime, unless, on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, *nor be deprived of* life, liberty, or *property, without due process of law;* nor shall private property be taken for public use, without just compensation. (Emphasis added)

Amendment XIV, Sec. 1, United States Constitution: All persons born and naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the States wherein they reside. *No State shall make or enforce any law which shall abridge the*

privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or *property without due process of law; nor deprive any person within its jurisdiction of the equal protection of the laws.* (Emphasis added)

STATEMENT OF FACTS

Mathias Jahner, age 65, drove over to where his neighbor Valentine Jacob, age 70, was fixing a fence. A scuffle ensued. Mathias Jahner was hospitalized, released, rehospitalized and died two months after the altercation. The case was tried to Judge Warner who awarded the estate $51,413.85. The principal questions were whether there was excessive force, the cause of the second hospitalization, and what part of the $28,000 in medical bills were from the fight. Although the bills were paid by Medicare, the court found these were damages and awarded the windfall to the widow and children.

The trial court permitted the written or dictated statements of five doctors to be admitted in evidence on the basis that they were admissible under the Business Records Act. The statements included the autopsy and post mortem which could not be considered treatment as the patient was dead. They weighed substantially on whether the seventy year old defendant had used excessive force in defending himself and on what part of the $28,000 medical bills were caused by the excessive force and what by other causes.

The statements were unsworn, the maker was not in court, cross-examination of the maker was denied. The trial lasted two days.

The Supreme Court of North Dakota held that unsworn testimony of absent witnesses was not to be considered by the judge in his decision but was to be received in evidence. They directed the judge to not reveal in the record the basis of his decision, and the doctrine of judicial infallibility would make his decisions impregnable. Unless, of course, the appellate court felt the outcome was wrong.

The trial judge had expressed his strong reliance upon the one doctor who did testify. That doctor based his expert opinion upon the unsworn statements of the other doctors. The Supreme Court of North Dakota refused to consider whether the doctor in giving his expert opinion could be relied upon to base it only upon admissible evidence.

The Supreme Court of North Dakota held that Jacob had the opportunity to call the five doctors for cross-examination. The record shows the trial judge denied Jacob's request to have them summoned to testify. The Supreme Court of North Dakota refused to consider this denial.

In the same mail that advised Jacob's counsel the Petition for Rehearing had been denied, there arrived voluntarily from the trial judge, Judge Warner, a transcript of the testimony of the Judge's doctor and a medical report of another doctor explaining that the Judge at the time of the trial had been under medication that left him unable to function. Also, his phlebitis made it impossible to sit on a case more than a day or two. The material was submitted to the Supreme Court of North Dakota who denied a reconsideration.

TIME AND MANNER OF RAISING CONSTITUTIONAL QUESTIONS

The constitutionality of the Business Records Act was not in issue in the trial court, only the admissibility of dictated statements of non-present, unsworn witnesses and the refusal to permit cross-examination. The Supreme Court of North Dakota, by its interpretation, denies the right to the attendance of the witness, the swearing of the witness and the cross-examination of the witness. If the act has this effect, it is unconstitutional and was so charged in the Petition for Rehearing, the first opportunity to raise the question.

The direction of the Supreme Court of North Dakota to the trial courts to let in any evidence, but conceal any reliance upon it, and rely on the presumption of judicial infallibility, was not in the case until the North Dakota Supreme Court decision and was challenged in the Petition for Rehearing, the first opportunity to raise the question.

"The question respecting the validity of the statute, as applied by the state court, first arose from the court's unanticipated act in giving to the statute a new construction which threatens rights under the Constitution." (32 Am Jur 2d, Fed Proc 262)

The constitutional question having arisen by the Supreme Court of North Dakota's decision, it was brought to their attention by a Petition for Rehearing. It was passed upon by the court in the Order Denying a Rehearing. The State Constitution does not compel an opinion on denying the petition.

ARGUMENT

"Due process is compounded of history, reason, and the past course of decisions". (16 Am Jur 2d, Const Law 454) According to Daniel Webster in the *Dartmouth College* case (*Dartmouth College* v. *Woodward*, 4 Wheat (US) 518, 4 L Ed 629) due process is "a law which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial."

Before the state can take one man's property and give it to another, certain things must be done in a fair manner with customary safeguards against mistake. Our history shows that it is better to have a witness sworn than not sworn. Whether the witness will then be more likely to tell the truth because of fear of God or fear of a perjury charge is left unresolved. But it is more reliable to have both these things affecting the testimony in the inquiry.

It is better to have the witness present in court than absent. Sometimes the manner of speaking, the hesitation, the existence of doubt or of certainty are better observed in hearing the witness than in reading his statements.

Since our search for justice has been built around an adversary type of proceeding, the right of party to examine the other party's witnesses is to be favored. Cross-examination has long been recognized as a tool in pursuit of justice that can help clarify or explain or even make unbelievable that which the witness has stated in his direct testimony.

Has due process been violated when a person's property is taken from him by the testimony of unsworn witnesses, not subject to perjury, not present in court, and whose cross-examination was not permitted?

History, reason and the past course of decisions would indicate that in the absence of *all* these safeguards, *some* due process is deprived.

But the Supreme Court can not monitor due process. However, where the highest state court has construed a statute in a way that threatens rights under the constitution, the granting of the Writ is in order.

> "* * * jurisdiction of the Supreme Court to review the proceeding of state courts * * * is limited to the specific instances of denials of federal rights." (32 Am Jur 2d, Fed Pract Sec 242)

> "Only in circumstances where the judgments of state courts as to the construction and applicability of state statutes collide with rights secured by the Federal Constitution does the Supreme Court have power to protect or enforce the federal rights." (32 Am Jur 2d, Fed Pract 242)

> "Thus, certiorari may be allowed where it is claimed that the decision of the state court involves an infringement of some provision of the Federal Constitution. Such as the clause relating to full faith and credit, the impairment of obligations of contracts, due process, or equal protection of the law." (32 Am Jur 2d, Fed Pract 259)

The North Dakota Business Records Act (31-08-01 NDCC and 31-08-10.1 NDCC) was found to include hospital records. The hospital records were found to include statements of doctors. The doctors' statements were found to include statements to the doctors as well as opinions, speculations, guesses, observation of things, people, and conduct. Some of the material involved treatment. Some of the material involved getting the plaintiff to hire

a lawyer. Some of the material involved preparation for the lawsuit by the doctors.

The Plaintiff had testified in another case and that was admitted in evidence in the present case. He said he could not remember what happened. The defendant testified that he had been attacked and his injured back driven against a post and he hit the plaintiff three or times until the plaintiff let loose of him. Thus whether the beating was small, medium, or large, was crucial to the question of self defense.

The plaintiff's health was bad so he had gone on social security disability a few years before. His hospital bills amounted to $28,000, all but a small part paid by Medicare. The amount of this bill that involved the scuffle, and how much from diverticulosis, bleeding ulcer, and heart attack, was crucial to the question of damages.

The North Dakota Supreme Court held that all the records should be received in evidence whether admissible or not. And then pointed out why:

> "This court, in 210 N.W.2d 96 (N.D. 1973), Schue v. Allery, on page 100, quoted approvingly from Builders Steel Co. v. Commissioner of Internal Revenue, 179 F.2d 377, 379, as follows:

> > 'In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have

been made. . . . On the other hand, a trial judge who, in the trial of a nonjury case, attempts to make strict rulings on the admissibility of evidence, can easily get his decision reversed by excluding evidence which is objected to, but which, on review, the appellate court believes should have been admitted.'

This statement was reaffirmed in Signal Drilling Company, Inc. v. Liberty Petroleum Company, 226 N.W.2d 148 (N.D. 1975), and in Matson v. Matson, 226 N.W.2d 659 (N.D. 1975)." (*Jahner* v. *Jacobs*, Appendix)

It is thus clear, that the Business Records Act, as now construed by the North Dakota Supreme Court, permits property to be taken from one and given to another by unsworn, absent, uncross-examined witnesses.

While the right to appeal is not guaranteed by the due process clause, the appeal having been granted, due process must be recognized along with the right to equal application of the law.

The right to appeal having been granted by statute, can the court abort this right by directing the trial courts to conceal their errors? The judge to whom all evidence flows is capable in the cathedral of his mind of paying attention to only the worthy. He is not capable of distinguishing on the record.

An error free trial appears fair.
An error hidden trial appears fair.
Therefore, an error hidden trial is an error free trial.

The precedent for such reasoning is longstanding:

A barn is red;
A fire engine is red;
Therefore, a barn is a fire engine.

The decision announced that the proper rule in a trial to a judge is for the judge to allow inadmissible evidence because no one can prove he considered it while if he kept it out and thus didn't consider it, proof of his error would be apparent. The theory is that the presumption of judicial infallibility is immune from attack if the evidence of actual error is cleverly hidden.

Making decisions of the trial court unreversible on review, does not make the decision fair or just or according to law. It gives the appearance of justice. It makes the people repose faith in the trial courts, which the people might lack when the Supreme Court reverses the trial courts on the basis that the trial judge did wrong. This effort to give the appearance of justice at the expense of justice is unacceptable. It brings to mind "We had to destroy the city in order to save it."

The court states that an error is clearly erroneous "only when * * * a reviewing court * * * is left with a definite and firm conviction that a mistake has been made."

This criterion is unconstitutional in that it is an unequal application of the law.

The Supreme Court Judges are not immune from being influenced by their feelings, prejudices, likes and dislikes. To pronounce such a doctrine is to grant the judges the right to give or take away based on their feelings.

If a case is tried to a jury, the "convictions" of the Supreme Court are not allowed to apply. When tried to a jury, an opportunity to get neutral feeling jurors is afforded. If the parties agree to try the case to a judge, provision is made for change of judge. But when the parties select a judge, and try the case to the court, on what pretentious basis does the appellate court reserve

a right to second guess the judge when not permitted to second guess the jury? The answer is that in a case tried to a jury, the law applied and the evidence admitted or refused are in the open and on the record. In a case tried to a judge, the Supreme Court has directed the trial court that its reasoning and the evidence considered are to be concealed in the caverns of his mind. Presumably he will do the right thing. If he does not, the appellate court will feel it. If this vision is strong enough, the trial court will be overturned.

It has been pronounced that we are a government of laws and not of men. The manipulation of presumptions and evidentiary rules giving trial judges power to conceal what they are doing, and appellate judges power to reverse on their feelings, is a deviation from the principle and a violation of the constitutional right to due process.

"Even the legislature itself does not have the power to declare what shall be conclusive evidence contrary to the fact. * * *

The due process of law clauses of our state and federal constitutions are 'standing guarantee(s) of substantial justice, and prevent such caprice or arbitrary action as would prevent a litigant from having a substantially fair trial.'" (*Juster Bros.* v. *Christgau*, (Minn 1943) 7 NW2d 501, 507)

IMPORTANCE OF QUESTIONS PRESENTED

Justice requires that the testimony of witnesses who have important evidence be made available. Recent immunity laws and decisions recognize this.

However, justice also requires that the testimony meet certain standards. With the panic over the costs of courts, strenuous efforts are being made to lower concern over the truth of the testimony in the interests of expediting the decision process.

It is important that the Supreme Court establish a line beyond which it will not allow due process to erode. It is not too much to expect the witness with crucial evidence to be sworn, to be subject to perjury, to be seen, to be cross-examined. It is not too much to expect the trial court to expose the reason for his decision, not conceal it. It is not too much to make judicial infallibility a presumption not a priori.

CONCLUSION

When the Eighth Circuit Court of Appeals announced in the *Builders Steel* case the fact that an appellate court will not reverse a case tried to the court because of inadmissible evidence, we hope it was pointing out a fact, not a procedure. However, in three swift 1975 decisions, the North Dakota Supreme Court has formulated the doctrine as a direction to the trial court of how to make the trial court's decision impregnable to reversal. While this will discourage appeals and substantially lighten the appellate load, it has a side effect. If that formula of judicial infallibility is not cut down, any lawyer who failed to demand a jury would be guilty of malpractice.

It is passing strange that we are about to celebrate the two hundredth anniversary of the passing of the divine right of kings and are about to embark on the divine right of judges.

Respectfully submitted,

WILLIAM R. MILLS
Box 518
406 Main Avenue
Bismarck, North Dakota 58501
Attorney for Petitioner

APPENDIX

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Frances Jahner, Executrix of the
Estate of Mathias Jahner,
Plaintiff, Appellee

v.

Valentine Jacob,
Defendant, Appellant

No. 9088.

DECISION

(Filed May 6, 1975)

1. Party asserting self-defense has burden of showing facts from which such defense might reasonably be inferred.

2. Justifiable force used in self-defense is that force which is no greater than that which the person relying on such justification reasonably believed to be necessary to prevent bodily injury to himself under the circumstances.

3. Questions of reasonableness of defendant's belief of being in danger of bodily injury and reasonableness of his belief as to the need for the amount of force he has used are relevant factors in determining whether force actually used was justified as self-defense.

4. Question of reasonableness of defendant's belief in using force in self-defense is one for the trier of fact.

5. Findings of fact will be recognized as such even though they may be denominated by their placement as conclusions of law.

6. Where question is whether trial court in case tried without a jury applied proper law in reaching its conclusions of law, reviewing court will not overturn presumption that proper law was applied where findings of fact from which conclusions issued were sufficiently specific so that they necessarily imply that proper rules of law were, in fact, applied.

7. Findings of fact of trial court will be upheld on appellate review unless they are clearly erroneous. Rule 52(a), N.D.R.Civ.P.

8. Reviewing appellate court will not presume that error was committed by trial court.

9. Where error in trial court has not been brought to the attention of appellate court by the parties, appellate court will not review such error except in those cases where such error is obvious or plain error affecting the substantial rights of one of the parties.

10. Under the facts in this case, trial court's finding that defendant used excessive force under the circumstances such as to preclude any justification upon the ground of self-defense was not clearly erroneous.

11. Hospital records are not excluded from admissibility under the business records exception to the hearsay rule, as codified in Section 31-08-01, N.D.C.C., when such records meet the requirements for trustworthiness.

12. Business records exception to hearsay rule as codified in Section 31-08-01, N.D.C.C., is to be liberally construed for the purpose of enlarging the operation of said business records exception.

13. Under the circumstances in this case, hospital records were admissible under Section 31-08-01, N.D.C.C., although individual portions of such records were subject to challenge as being without the ambit of the section.

14. Self-serving statements in hospital records by party to action which are offered to establish cause of injury as a result of which hospitalization was necessitated or to establish liability as against other party to action are not admissible in action over objection, although such statements may be admissible under some circumstances where statements, at time they were elicited, were made to aid in the diagnosis and treatment of the declarant.

15. Appellate court will not reverse judgment of trial court in nonjury case because of admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the trial court to make an essential finding which would not otherwise have been made.

16. No error in admission of evidence is ground for setting aside a judgment unless refusal to set aside judgment appears to the court inconsistent with substantial justice. Rule 61, N.D.R.Civ.P.

17. Even if, on a hypertechnical basis, error appertained in this case when trial court admitted *in toto* hospital records containing objected to opinions of physicians and objected to self-serving statements of party, such error would be harmless error in light of fact that case was tried to court without jury and court can be expected to sift through evidence and rely only upon admissible evidence in reaching its decision.

18. Testimony of predecessor party to action preserved in transcript of preliminary examination of prior criminal action is admissible in action arising out of same facts, where party objecting to such testimony had opportunity to cross-examine at preliminary examination and where this court had ruled in prior criminal action that such testimony was reliable and admissible.

19. In reviewing allegations of insufficiency of evidence to support findings of facts of trial court the main issue is whether or not findings are clearly erroneous in that, after a review of the entire record, appellate court is left with firm conviction that mistake has been made in trial court's findings of fact as promulgated.

20. In the instant case, trial court's findings of fact are supported by substantial evidence in light of review predicated upon question of whether findings are clearly erroneous.

21. Trial court's finding that cost of replacement of services for predecessor plaintiff was proper element of damages was not clearly erroneous.

(Syllabus by the Court)

Appeal from the district court of Emmons County, the Honorable Wallace E. Warner, Judge.

AFFIRMED.

Opinion of the Court by Sand, Judge.

William R. Mills, Box 518, Bismarck, for defendant, appellant.

Wheeler, Wolf, Wefald & Durick, Box 773, Bismarck, for plaintiff, appellee; argued by Mr. Albert A. Wolf.

No. 9088

Jahner v. Jacob

SAND, Judge.

This is an appeal by defendant Valentine Jacob from a judgment for damages in favor of the plaintiff, Estate of Mathias Jahner, rendered by the district court of Emmons County in a trial without jury for injuries sustained as a result of a civil battery by Jacob upon Jahner. Previously, a criminal action arising out of the same situation was appealed and decided by this Court in State v. Jacob, 222 N.W.2d 586 (N.D. 1974).

Jacob contends that a new trial should be granted on eight grounds, which will be stated in the discussions following.

The basic, uncontested facts may be summarized as follows:

Math Jahner and Valentine Jacob, each separately owned or helped operate separate but adjoining farms in Emmons County, were neighbors and knew each other all of their lives. On the morning of October 9, 1973, Valentine Jacob was repairing a fence on a farm. At about 9:15 in the morning Jahner drove his pickup to where Jacob was, made a U-turn, parked on the opposite side of the road, got out of the vehicle, and came over to Jacob. An altercation took place in which Jahner sustained injuries. Jahner brought this action, but passed away while it was pending, whereupon his executrix was substituted as party plaintiff. This action is not for wrongful death.

The testimony is not in harmony as to what precipitated the altercation. The testimony relating to the altercation consists primarily of the transcript of Jahner's

testimony given at the preliminary hearing in State v. Jacob, the criminal case referred to above, and the testimony of Jacob given during the trial of the instant case.

The testimony of Mathias Jahner at the preliminary hearing, in condensed form is as follows:

The evening before the altercation took place, Jahner saw somebody working at the place where the altercation occurred. When he drove up there in the morning he first thought it was Ray (the son of Jacob) who was working there. He had seen people working there the night before. Jahner thought they were closing up the approach which had been cut out about three weeks before. He just drove up there to see if there was an opening to haul two or three loads of hay, because it was about to rain and drizzle. When he came there he saw it was Valentine Jacob, and not his son Ray. Jahner never had an argument with Valentine in his life. After he got out of the truck he walked over to Jacob and said, "Good morning, I thought we were going to haul our hay today." Jacob came over to him and replied, "You came at the right time." Jahner then got a beating from Jacob. Jahner did not try to hit Jacob. Jahner is 64 years of age, 5′ 6″, and weighs about 155 pounds. Jacob hit Jahner about the face, shoulders and body with his fist. Jahner didn't think he would get a beating from Jacob by just talking and saying good morning to him. Jahner also testified, "Gosh, I just got the beating and that's all. I don't know any more where all the places were or what." Jahner, after the beating, managed to drive home, and from there he was taken to the Clinic and then later to the hospital.

The testimony of Valentine Jacob at the trial in the instant case, in a condensed form, is as follows:

When Jahner came up to him he was working on a fence; that Jahner had driven up in a truck, made a U-turn and parked on the opposite side of the road; that when Jahner came up and hit him in the body once and pushed him against the fence post, Jacob said, "That is all I help you out all them years, that is all I get from you? Then I grabbed him [Jahner]." Jacob further testified that as he grabbed Jahner he turned him around with his left hand and hit him with his right hand across the shoulder and neck while Jahner was hanging on; that after he had turned Jahner around, Jahner wasn't hitting any more, that Jacob hit Jahner three or four times with this fist, and then he (Jacob) let Jahner loose. He further testified that while Jahner was being hit and was going down Jahner said, "Let me go and I will build the approach another place." Jacob also testified (in justification) as follows: "Well, if I hadn't hit him he [would have] hit me. He [would] beat me up. Yeah, maybe I let him loose he hit me again." Jacob testified that he was concerned over the fact that Jahner drove his pickup in the manner that he did and turned it around and parked it on the other side of the road.

Jacob pleaded self-defense in his answer to the complaint.

Jacob contends that the trial court used an incorrect formula as to what force a person may use to repel an attack. He contends, and we do not disagree, that the measure of force a person attacked may use (in self-defense) is what he reasonably believes his safety requires, and not that amount which one would decide necessary with the benefit of 20/20 hindsight.

Jacob argues the supposition that the trial court erroneously applied the rule of law contained in the jury

instruction in State v. Jacob, 222 N.W.2d 586 (N.D. 1974), which this court held was error.[1] The erroneous instruction contained the following provision: ". . . if the force or violence used is more than sufficient to prevent such offense."

This court's decision in the *Jacob* case was rendered on October 10, 1974, and the instant case was tried by the court on October 3, 1974. Jacob's argument rests primarily on the fact that our decision in State v. Jacob was later in time than the trial in the instant case, and upon the fact that both cases were tried in the same district, but before different judges.

There, however, is a counter supposition having equal or greater force, namely, that the trial court had available to it the North Dakota Jury Instructions, and was aware of and knew the contents of instruction No. 321, which was formulated upon the rule of law announced by this court in McLean v. Foisie, 33 N.D. 646, 157 N.W. 840 (1916), the pertinent portion of which instruction reads as follows:

> "He [defendant] must prove that no more force was used than he reasonably believed necessary to prevent an offense against his person or property."

Jacob also contends that the court erred in relying on the case of Powell v. Meiers, 54 N.D. 336, 209 N.W. 547 (1926), because it, in Jacob's contention, did not use the correct rule pertaining to reasonableness of defendant's belief of being in danger [permitting the use of corresponding force to protect against or repel the danger],

---

1. To prevent an erroneous impression, we need to emphasize that this court did not overrule a prior rule of law of this court.

but rather used the rule stating that no more force can be used than is necessary.

The trial court, in announcing its decision from the bench at the conclusion of the trial, made mention of the *Powell* case in the following context:

> "I think as to the answer of the defendant, where the main claim, of course, is self-defense, starting way back in North Dakota legal history with Powell v. Meiers, 209 N.W. 547, where self-defense, the burden of the plea of self-defense is upon the defendant, I do not think the defendant has sustained that burden because the Court believes that more force was used by the defendant in this action than what was necessary to defend himself"

The *Powell* case involved a situation where the defendant Meiers came to Mrs. Powell's residence for the purpose of borrowing a rifle belonging to her son. The request was refused by Mrs. Powell, whereupon abusive language was used by Meiers, calling her ugly names and casting grave imputations upon her virtue. Mrs. Powell then struck Meiers in the face with a hand towel which she had in her hand when she came out of the kitchen, whereupon the defendant struck her in the eye with a clenched fist and kicked her in the leg, causing bruises, pain and discomfort. The *Powell* case, unlike the instant case, was tried to a jury. The *Powell* jury instruction as to the reasonableness of the force which may be used in self-defense, stated as follows:

> "And since the plaintiff was in the first instance the aggressor and made an assault upon the defendant, the defendant would have a right to use such force in resisting such assault and protecting himself against

harm and injury therefrom as appeared to him at the time, with good faith, to be reasonably necessary."

The foregoing instruction, although a part of the record in the *Powell* case on file with this court, is not reflected in the opinion because this court, in *Powell,* found it unnecessary to discuss the rule of law as to what the defendant reasonably believed to be necessary to repel the force because of the lack of facts to warrant it. This court, in 209 N.W. at 549, said:

"The testimony is clearly sufficient to support a verdict by the jury that the defendant used more force than was necessary to defend himself against the attack made upon him by the plaintiff. We are not impressed that the defendant Meiers was in such grave danger of personal harm at the hands of Mrs. Powell that he was justified in hitting and kicking her with the force disclosed by the record, or at all. . . . If he did experience 'more pangs and fears than wars or women have,' the record does not suggest it."

It necessarily follows that if the defendant proposes to justify the force used in self-defense on the basis he reasonably believed he was in great physical danger, he must present evidence which would tend to support such belief. If such evidence is not produced, the court is not required to give any serious consideration to the frame of mind of the defendant, because without such evidence the court could not draw reasonable inferences regarding such state of mind. Thus, under the factual situation in *Powell* this court had no reason to discuss the rule of self-defense, but upheld the rule of law which places the burden upon the defendant to prove the plea of self-defense.

The proper rule of law is stated in State v. Jacob, *supra,* at syllabus 1, as follows:

"An instruction on self-defense given in a criminal action should advise the jury that the force exercised in self-defense is not deemed excessive if it is no greater than that which the actor reasonably believed to be necessary to repel the offense."

This court has stated the rule of law in a civil case, in syllabus 5 in Julson v. Loyal Order of Moose Number 822, 140 N.W.2d 39 (N.D. 1966), as follows:

"Factors to be considered in determining whether a person acted in self-defense and is thereby exempt from liability for injury caused to another are the reasonableness of his belief [of being] in danger and the reasonableness of his belief of the need of the amount or degree of force used."

It thus becomes apparent that the rule of law is substantially the same in both civil and criminal cases.

The rule of law is also stated in 6 Am.Jur.2d *Assault and Battery* § 161, page 135, as follows:

"In a civil action for assault, the defendant's belief that the plaintiff intended to do him bodily harm cannot support a plea of self-defense unless it was such a belief as a reasonable person of average prudence would have entertained under similar circumstances. It is not necessary that the danger which gave rise to the belief actually existed; it is sufficient that the person resorting to self-defense believed in the existence of such a danger, and such reasonable belief is sufficient even where it is mistaken. In forming such reasonable belief a person may act upon appearances."

At Section 162:

> "It is thus seen that the right of self-defense is not limited by actualities, but by reasonableness of belief, and that a person may be justified by self-defense where he used such force as reasonably appeared to him necessary to repel the attack, although the force used by him was greater than in retrospect appears to have been actually necessary. One who uses excessive force in repelling an attack may not be precluded from asserting self-defense, but may become civilly liable as an aggressor for so much of the force used as is excessive."

And at Section 163:

> "In determining whether only reasonable and necessary force was used by the person claiming to have acted in self-defense, the relative physical strength of the attacker and the party attacked, differences in their ages or sex, are to be taken into consideration."

This necessarily means that the defendant must have some reasonable basis for believing himself to be in danger. It does not permit mere conjuration or imagination of being in great danger without a reasonable basis therefor, and it does not permit responding with unnecessary great or devastating force.

The reason for believing that he is in danger must have some reasonable basis. The question of whether defendant's belief of being in danger was reasonable is for the trier of fact to decide. It necessarily follows that the trier of fact must have some evidence upon which to make this determination.

The trial court in the instant case made the following pertinent findings of fact:

> "V.
>
> "That the defendant used excessive force to repel an attack of the plaintiff upon him if such attack took place, and that such excessive force caused the injuries sustained by plaintiff."

Under the conclusions of law, the court stated as follows:

> "IV.
>
> "That defendant failed to sustain his burden of proof of self-defense as a justification for the assault and battery committed upon the plaintiff, in that the force used upon the plaintiff by the defendant was excessive to repel the appearance of any attack by the plaintiff upon the defendant, and that the defendant continued to strike the plaintiff about the head after he had fully subdued the plaintiff as to any attack or appearance of attack upon the defendant."

Findings of fact are recognized as such even though they may be denominated by their placement as conclusions of law. This court, in Ferguson v. Ferguson, 202 N.W.2d 760 (N.D. 1972), said, ". . . the labels placed upon the findings by the district court are not conclusive." *See also,* Wilson v. Allstate Insurance Co., 186 N.W.2d 879 (S.D. 1971), which in effect said that a fact found by the court, although expressed as a conclusion of law, may be treated on appeal as a finding of fact.

Jacob did not move pursuant to Rule 52(b), N.D.R. Civ.P., to amend the findings of fact or to make additional findings so as to be more specific. See Ellendale Farmers

Union Cooperative Ass'n v. Davis, 219 N.W.2d 829, 836 (N.D. 1974), for the purpose of the rule. Neither did he move for a new trial under Rule 59(b)(6). Under these circumstances, we review the findings as they exist, including the necessary implications to be drawn therefrom.

The facts recited in paragraph V of the findings of fact and in the mixed finding of fact and conclusions of law as found in paragraph IV of the conclusions of law set out earlier above herein, constitute a finding by the trial court that Jacob used greater force than he could have reasonably believed to be necessary to defend himself from any real or apparent danger. These findings support the proposition that the court was aware of the proper rule of law and that the court applied the appropriate rule of law pertaining to reasonableness of the force used to repel any real or apparent danger.

The facts as found by the trial court will be upheld on appeal unless they are clearly erroneous under Rule 52(a), N.D.R.Civ.P.

Jacob has failed to call to our attention, and we, after a careful examination of the record, are unable to find any evidence which would have legally required the trial court to give greater special consideration than it did in its findings of fact to the proposition whether Jacob had a reasonable fear, real or apparent, of being in such danger as to justify him in using the great force to defend himself against the apparent danger or to repel it.

To accept the argument of Jacob would require us to place a strained construction and interpretation upon the findings of fact and conclusions of law, and would also require us to presume that error was committed. On review, this court does not presume error was committed. The court on appeal will recognize on its own only obvious or plain error.

From the examination of the record we cannot conclude that the trial court applied an incorrect rule of law (formula) as to the force a person may use to repel an attack. To the contrary, we conclude that the court did apply the correct rule of law.

By reaching the conclusion that the findings of fact and conclusions of law in this instance are adequate we are not de-emphasizing the value or significance of findings of fact or conclusions with specificity as to each issue involved.

The facts as found by the trial court (including the facts found in the mixed finding of fact and conclusions of law erroneously denominated as "conclusions of law") support the conclusion of law that Jacob failed to sustain the burden of proof required of him by law, and that he used excessive force under the circumstances.

Having disposed of the foregoing issue, we now move to Jacob's contention that the trial court erred in admitting into evidence the opinions of the several doctors contained in Jahner's voluminous hospital records, which hospital records were admitted into evidence. Jacob contends that the admission of these doctors' opinions was erroneous and prejudicial and that one of the reasons prejudice appertained was that the opinions of the doctors were before the court without the benefit of cross-examination to explain, modify or discredit them.

Section 31-08-01, N.D.C.C., and its companion provision, Section 31-08-01.1, N.D.C.C. [both provisions being relevant portions of the North Dakota Business Records Act] provide for the admission of business records if they meet the requirements set forth in the Act. The term "business" as used in the foregoing section, pursuant to the provisions of the Act, includes every kind of business, pro-

fession, occupation, calling or operation of institutions, whether carried on for profit or not. This clearly does not exclude hospital records.

This court, in Endicott Johnson Corporation v. Golde, 190 N.W.2d 752, 756-757 (N.D. 1971), said:

> "The purpose of the enactment of § 31-08-01, N.D.C.C., was to enlarge the operation of the business records exception to the hearsay evidence rule and § 31-08-01 should be liberally construed to that end. J. R. Watkins Company v. Vangen, 116 N.W.2d 641, ¶ 8 of syllabus (N.D. 1962). See also Interstate Collection Agency, Inc. v. Kuntz, 181 N.W.2d 234, 240-241 (N.D. 1970)."

In 32 C.J.S. *Evidence*, § 682(1), page 895, is found the following:

> ". . . the purpose of these statutes [Business Records Act] was to broaden the scope of admissibility of records made in the regular course of business to facilitate the admission of records which experience has shown to be quite trustworthy, to make it unnecessary to call as witnesses the parties who made the business entries, or who participated in doing the work reported, and to bring the realities of business and professional practice into the court room in usable form."

In addition to this, particularly with reference to hospital records, Wigmore on Evidence (3d ed) Vol. 6, § 1707, page 36, makes the following observations:

> ". . . They [hospital records] should be admissible, either on identification of the original by the keeper, or on offer of a certified or sworn copy. There is a Necessity (*ante*, § 1421); the calling of all the individual attendant physicians and nurses who have co-

> operated to make the record even of a single patient would be a serious interference with convenience of hospital management. There is a Circumstantial Guarantee of Trustworthiness (*ante*, § 1422); for the records are made and relied upon in affairs of life and death. Moreover, amidst the day-to-day details of scores of hospital cases, the physicians and nurses can ordinarily recall from actual memory few or none of the specific data entered; they themselves rely upon the record of their own action . . . ."

These authorities clearly establish that hospital records are admissible.

While there is ample authority for the admissibility of hospital records generally under the Business Records Act, or similar Acts, the individual entries, however, are subject to scrutiny and may be excluded or eliminated from such records on the basis that these entries are otherwise not admissible. See 40 Am.Jur.2d *Hospitals and Asylums* §§ 442, 443, pages 882 to 886. Self-serving statements in a hospital record, if offered to establish how the injury occurred or to establish liability, are not admissible unless the statement is relevant and helpful to or serves as an aid in the diagnosis and treatment of the patient's injury. See 32 C.J.S. *Evidence* § 728, pages 1038 and 1039.

Nevertheless, in a non-jury case, as in the instant case, the trial judge who is entrusted by law and deemed qualified to rule on admissibility of the record or individual entries thereon, is capable of recognizing those entries which are improper evidence, particularly if the matter has been objected to and reasons given to the court why it should not be admitted or considered.

Specifically as to Exhibit 1A, records for Jahner's first hospitalization, Jacob stated he had no objection to its admission, but he did object to Exhibit 1B (records of the second hospitalization) on the basis that no showing had been made tying together the altercation and the second hospitalization.

The connection between the second hospitalization and the injuries attendant upon the altercation was later established through testimony from Dr. Fortman, Jahner's attending physician.

Jacob had the opportunity to call attention to certain matters in these exhibits and object to the consideration of those items. Jacob also had the opportunity to call as witnesses those doctors who had knowledge with reference to the medical opinions contained in these records for direct or cross-examination.

This court, in 210 N.W.2d 96 (N.D. 1973), Schue v. Allery, on page 100, quoted approvingly from Builders Steel Co. v. Commissioner of Internal Revenue, 179 F.2d 377, 379, as follows:

> "'In the trial of a nonjury case, it is virtually impossible for a trial judge to commit reversible error by receiving incompetent evidence, whether objected to or not. An appellate court will not reverse a judgment in a nonjury case because of the admission of incompetent evidence, unless all of the competent evidence is insufficient to support the judgment or unless it affirmatively appears that the incompetent evidence induced the court to make an essential finding which would not otherwise have been made. . . . On the other hand, a trial judge who, in the trial of a nonjury case, attempts to make strict rulings on the admissibility of evidence, can easily get his decision reversed by excluding evidence which is objected to, but which, on review, the appellate court believes should have been admitted.'"

This statement was reaffirmed in Signal Drilling Company, Inc. v. Liberty Petroleum Company, 226 N.W.2d 148 (N.D. 1975), and in Matson v. Matson, 226 N.W.2d 659 (N.D. 1975).

The record discloses that the material Jacob considered objectionable in the hospital records was questioned by a motion to strike made by Jacob at the trial, and Dr. Fortman, one of the persons responsible for maintaining the records, was examined. The trial court was thus made aware of the material Jacob considered inadmissible. However, we are impressed with the statement made by Justice Vogel in Schue v. Allery, *supra*, 210 N.W.2d at 99:

> "We believe that a trial judge, in a nonjury case, should ordinarily admit all evidence which is not clearly inadmissible. A judge who is competent to rule upon the admissibility of evidence can distinguish in his own mind, when deliberating his ultimate decision, between evidence which is admissible and evidence which is not admissible."

The record does not indicate that the trial court relied upon or had to rely upon inadmissible evidence for its findings of fact and conclusions of law.

We are also mindful of Rule 61 of the North Dakota Rules of Civil Procedure, which provides, in part, as follows:

> "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a

> new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice."

We do not believe there was prejudicial error, but even if, on a hypertechnical basis, there was error, in the admission of these records, it would be harmless error in this instance.

For the foregoing reasons, we conclude that it was not prejudicial error to admit the hospital records.

Jacob contends, as a further basis for reversal of the trial court's decision, that the statements made by Jahner to the various physicians who did not testify (and to Dr. Fortman, who did) should not have been admitted into evidence. This issue has already been decided by us adversely to Jacob on the rationale we previously applied in arriving at our determination that it was not prejudicial error for the trial court to admit into evidence the hospital records (with the physicians' opinions complained of therein) which applies with equal validity to the trial court's admission into evidence of Jahner's statements as contained in those same hospital records along with the testimony of Dr. Fortman. Here, as in the former instance, the objectionable entries in the hospital records and the objectionable portion of Dr. Fortman's testimony were called to the attention of the trial court. As we have said before, this case was tried to the court without a jury, and the precautions necessitated to prevent the perusal of possibly inadmissible evidence by a jury did not appertain.

Jacob also contends that the transcript of Jahner's testimony from the preliminary hearing in the criminal case of State v. Jacob, *supra*, should not have been admitted

into evidence. At the trial, Jacob moved to have Jahner's testimony stricken from the record.

This court, in State v. Jacob, *supra*, the criminal case which arose out of the same altercation, resolved the question of whether or not the transcript of Jahner's testimony at the preliminary hearing was admissible in evidence in a criminal proceeding, as follows:

> "The key to the admissibility of former testimony of a witness is the unavailability of that witness at the subsequent trial. California v. Green, Harlan, J., *concurring*, 399 U.S. 149, 172, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *cf.* Maucusi v. Stubbs, 408 U.S. 204, 92 S.Ct. 2308, 33 L.Ed.2d 293 (1972); Barber v. Page, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).
>
> "We have held that where a witness is unavailable for trial, his testimony at a former trial of the same issue is admissible where there was, at the first trial, adequate opportunity for cross-examination. State v. McCarty, 49 N.D. 912, 194 N.W. 335 (1923). We think that the safeguards present at the preliminary hearing were adequate. The complainant was unavailable, having died prior to the trial. At the preliminary hearing the defendant had an opportunity to cross-examine the complainant and, in fact, did conduct a lengthy examination of the complainant. If the cross-examination was not as penetrating as it might have been, it was only because counsel for the defendant chose not to make it so. The judge who presided at the preliminary hearing is not alleged to have curtailed the cross-examination in any way."

The same considerations apply to the present case, and we therefore conclude that the admission of the

transcript of the testimony given by Jahner at the preliminary hearing does not constitute error.

Jacob next contends that there is insufficient admissible evidence to support a conclusion that the defendant used more force than he believed was required, or to support the conclusion that the damages were caused by the assault and battery.

Jacob did not move for a new trial on grounds of insufficiency of evidence, as permitted under Rule 59(b)(6), N.D.R.Civ.P. We must therefore review the findings as they exist. This court, in Trinity Builders, Inc. v. Schaff, 199 N.W.2d 914 (N.D. 1972), in substance said that an allegation of insufficiency of evidence to sustain the decision is not reviewable de novo in this court. Our review is limited to the determination of whether or not the findings of fact are clearly erroneous under the provisions of Rule 52(a), N.D.R.Civ.P.

This court in In re Elmer Estate, 210 N.W.2d 815 (N.D. 1973), said, pursuant to Rule 52(a) a finding is clearly erroneous only when, although there is some evidence to support it, a reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. In reviewing the findings, this court should also give due regard to the opportunity of the trial court to judge the credibility of witnesses. Mittelstadt v. Bender, 210 N.W.2d 89 (N.D. 1973).

Mistake or error is never presumed and appellant has the burden of showing that error was prejudicial. City of Minot v. Fisher, 212 N.W.2d 837 (N.D. 1973), and Schollmeyer v. Saxowsky, 211 N.W.2d 377 (N.D. 1973).

The admissibility of evidence and testimony has been discussed earlier herein and need not be repeated here.

The conclusions reached earlier have application to this subject matter. The findings of fact by the trial court are supported by substantial evidence, particularly the testimony of Jahner given at the preliminary examination. The trial court could have relied upon the testimony of Dr. Fortman, which clearly establishes that Jahner sustained injuries and that the injuries were of the nature and kind which could result from the "beating" Jahner received. The testimony of Jahner in the transcript of his testimony at the preliminary examination establishes that he received a beating. Dr. Fortman's testimony also establishes that both the first and second hospitalizations were not the result of pre-existing conditions independent of those precipitated by the altercation. There is sufficient evidence to support the findings of the trial court that the hospitalization and medical expenses were incurred as a result of the altercation of October 9, 1973. While detailed specific findings of fact are of great significance and value, and in some instances are necessary, the trial court in this case was not required to detail each particular item in the findings and relate it to the specific individual action of the altercation. The medical expenses (special damages) allowed by the court are supported by substantial evidence.

In reviewing the evidence of the entire record we are not left with a definite and firm conviction that a mistake has been made, but rather conclude that the findings of fact by the trial court are supported by substantial evidence and are not clearly erroneous.

Jacob also contends that damages were improperly allowed to hire a replacement for the son who had taken over the farm from Jahner and then later went to college. There is evidence which supports the damages allowed for

the man hired to do the work of the son who went to college. The testimony establishes that Jahner would have performed the services, but because of the injuries sustained the hired help had to be obtained. The amount of $725.00 allowed by the court for the hired man is supported by the evidence. The mere fact that a portion was paid by check and a portion in cash does not in itself discredit the direct testimony.

Other contentions raised by Jacob are either deemed abandoned or are not deserving of further special consideration.

Jacob also raises the question whether the Jahner estate has enriched itself by claiming hospital expenses or bills which were paid by Medicare. The record indicates that some hospital bills and medical bills were paid by the Medicare program. This question was not argued, nor did Jacob's brief explain the processes which may be involved. We, however, must assume that Medicare, not a party to this action, will take appropriate steps or procedures to make any claim, if it is appropriate or necessary.

The judgment of the trial court is affirmed.

/s/ P. M. Sand
/s/ Wm. L. Paulson
/s/ Vernon R. Pederson
/s/ Robert Vogel
/s/ Ralph J. Ericstad, C.J.

(Heading Omitted)

JUDGMENT

The above action having come on for trial before the Court, without a jury, on the 2nd day of October, 1974, at the Emmons County Courthouse in Linton, North Dakota, the Honorable Wallace E. Warner, Judge of the District Court in and for Emmons County, North Dakota, presiding, and the parties being represented by their respective counsel. The Court having heard the testimony of the parties, and being advised in the premises, having made its Findings of Fact, and Conclusions of Law, and having ordered that Judgment be entered accordingly,

IT IS HEREBY ORDERED that judgment is entered in favor of the plaintiff Frances Jahner, Executrix of the Estate of Mathias Jahner, and against defendant Valentine Jacob, in the amount of $28,520.85 for special damages, and $22,500.00 for general damages, and for plaintiff's costs and disbursements incurred in this action.

Dated this 14th day of November, 1974.

BY THE COURT:

/s/ A. P. Schmidt
A. P. Schmidt
Clerk of Emmons County
District Court

RETAXATION OF COSTS

Costs are retaxed in favor of the plaintiff and against the defendant pursuant to the Retaxation of Costs and Judgment filed herein, in the amount of $393.00, and made part of the Judgment filed herein.

Dated this 19th day of November, 1974.

BY THE COURT:

/s/ A. P. Schmidt
A. P. Schmidt
Clerk of Emmons County
District Court